In The

SUPREME COURT OF THE UNITED STATES

October Term, 1975

No. 75-1578

LOUIE L. WAINWRIGHT, Secretary, Department of Offender Rehabilitation, State of Florida,

Petitioner,

vs.

JOHN SYKES, #003316,

Respondent.

PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

BRIEF FOR RESPONDENT IN OPPOSITION

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JURISDICTION

The jurisdictional requisites are adequately set forth in the Petition.

QUESTIONS PRESENTED

1. Whether, as a prerequisite to the admissability of any admission or confession of a Defendant in a criminal prosecution, the State is required to hold an evidentiary hearing outside the presence of the jury to determine if it was voluntarily made.

2. Whether Jackson v. Denno, 378 U.S. 368 (1964), mandates a voluntariness hearing where the admissability of the

confession or admission is not challenged and where such denial would deprive a person of a fundamental right and would be inherently prejudicial to the Defendant.

STATEMENT OF THE CASE

The Respondent accepts and adopts the Statement of the Facts as referred to in the Brief of the Petitioner except the contention by Petitioner that the failure to object to the admissability of confession constituted a waiver of his right to a hearing on the voluntariness of the confession. In addition, Respondent applied to the trial Court, the Second District Court of Appeal of Florida, and to the Supreme Court of Florida for a hearing by way of Petitions for Writ of Habeas Corpus - all of which were denied. Failing in all State Courts, Respondent sought relief in Federal District Court.

REASONS FOR DENIAL OF CERTIORARI

1. THERE IS NO IMPORTANT QUESTION OF FEDERAL LAW.

The decision of the lower Court did not deny the State the right to insist on enforcement of its procedural rule, nor did it destroy the rule. Rather as the lower Court correctly stated:

> "The state's interest the, if not to be reduced to mere form in having Florida Criminal Procedure Rule 3.190(i) followed, must be co-extensive with the established burden on the state." (Text from lower Court's opinion in Petitioner's Appendix at Page A-17).

The burden upon the State is to make a prima facie determination of voluntariness, not upon the Defendant to demand it. McDole v. State, 283 So.2d 553 (Fla. 1973); Reddish v. State, 167 So.2d 858 (Fla 1964); Young v. State, 140 So.2d 97 (Fla. 1962); Smith v. State, 288 So.2d 522 (Fla. App. 1974). Therefore, a hearing on voluntariness is a prerequisite to any assertion of waiver because of the Defendant's failure to object.

The lower Court specifically gave effect to the rule by stating that the rule may foreclose a Defendant from any subsequent arguments or attach once a determination has been made regarding the voluntariness and admissability of the statement in question.

The decision of the lower Court in the instant case does not raise the issue of whether State procedural rules should be followed or not but rather that the rule involved is not as narrow as the Petitioner demands.

2. THERE IS NO CONFLICT OF DECISION.

The Petitioner relied on Henry v. Mississippi, 379 U.S. 443 (1965) and Davis v. United States, 411 U.S. 233 (1973) for its contention that the failure to raise a constitutional issue, as required by the rule, constitutes a waiver and precludes consideration of the issue in collateral proceedings. However, these cases do not rely solely on whether a timely objection was made, but rather whether

the defense deliberately bypassed the State procedural rule or whether there was prejudice to the Defendant by such a waiver.

Similarly, the Petitioner claims that the holding of the lower Court is in direct conflict with that of the Seventh Circuit in United States ex rel Allum v. Twomey, 484 F.2d 740 (7th Cir. 1973). However, the Court in Twomey said there was a reasonable tactical basis for the failure to object; and also, there was no prejudice shown. Therefore, the present case is not in conflict.

Furthermore, there is no conflict with Curry v. Wilson, 405 F.2d 110 (9th Cir. 1969). The Court determined there, as in the above cases, that the record conclusively demonstrated that the defense deliberately, as a matter of trial strategy, waived the grounds.

In the present case, there was no affirmative decision to waive the voluntariness hearing. The lower Court was absolutely correct in stating that the admissability of a confession or incriminating statement is inherently prejudicial. In addition, there was no possible advantage for the defense's failure to object. Therefore, no direct conflict with the cases relied upon by the Petitioner exists with the lower Court's decision that the lower Court found that there was no evidence of a waiver for trial tactics.

3. THERE IS NO CONFLICT IN THE DECISION OF THIS COURT AS REGARDS Jackson v. Denno, 378 U.S. 368 (1964), REQUIRING A VOLUNTARINESS HEARING WHEN A CONVICTION IS FOUNDED ON AN INVOLUNTARY CONFESSION.

The Petitioner places its emphasis on the word "challenge" in the claim that a voluntariness hearing was not required in the present case. The Petitioner adds further that Jackson v. Denno, 378 U.S. 368 (1964) only requires a proper forum to be provided whereby a challenge to the voluntariness of a confession will be determined by the Court as a matter of law. However, these claims seem to ignore the basis of a voluntariness hearing. This Court cited Rogers v. Richmond, 365 U.S. 534, in the decision in Jackson by stating that:

> "It is now axiomatic that a Defendant in a criminal case is deprived of due process of law if his conviction if founded in whole or part upon an involuntary confession, without regard for the truth or falsity of the confession."
> (Text at 376, emphasis supplied).

This Court stated in Sims v. Georgia, 385 U.S. 538 (1967) that the Jackson decision is a constitutional rule and the rule states that a jury must not hear a confession unless and until it has been determined by the trial judge to have been willingly and voluntarily made.

In addition, the decision in Sims required that the record must show with unmistakable clarity that the confession was voluntary.

The Petitioner cites Lego v. Twomey, 404 U.S. 477 (1972) to further emphasize the need for a "challenge" prior to requirement of a voluntariness hearing. However, the opinion also states that only voluntary confessions may be admitted at the trial.

In its Supplemental Brief, the Petitioner relies on the two additional cases of Estelle v. Williams, Case No. 74-676, as reported in 19 Cr.L 3061, and Frances v. Henderson, Case No. 74-5808, as reported in 19 Cr.L 3072, both of which can be distinguished from the present case. In Estelle v. Williams, this Court stated that the failure to object to the accused wearing prison garb could well be viewed as part of trial strategy. This Court added further that the burden of a trial judge is less than that which is required in a situation similar to Johnson v. Zerbst, 304 U.S. 458 (1938). In Zerbst, there was a relinquishment of a fundamental right and thus due process would require a willing waiver of counsel. Similarly, due process would require that a confession go to a jury only upon a determination that it is voluntary.

This Court in Frances v. Henderson, does not say, as Petitioner claims, that the principles of comity require that the rule of Davis v. United States, 411 U.S. 233 (1973), applies with equal force whenever a Federal Court is asked in a habeas corpus proceeding to overturn a State Court conviction. But rather, it was limited to the situation involving an allegedly unconstitutional Grand Jury indictment. Furthermore, the above rule concerning grand juries may indeed require "cause" to be shown and actual prejudice also. Whereas, in the present case the lower Court was absolutely correct in stating that prejudice is inherent when the case involves the admissability of a confession or incriminating statement.

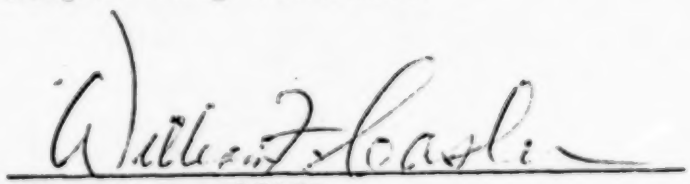
Finally, the issue of whether Jackson v. Denno, 378 U.S. 368 (1964), mandates a voluntariness hearing does not even

have to be decided. As indicated earlier and as the lower Court properly stated, Florida practice has required the trial judge to hold a hearing outside the presence of the jury to determine the voluntariness of any statements made by the Defendant proposed to be used against him. The burden is on the State to secure a prima facie determination of the voluntariness of the confession, not upon the Defendant to demand it. The lower Court properly stated in its decision that should the Prosecutor fail to lay the proper predicate for the introduction of a confession or admission that the Court has a responsibility to inquire as to the voluntariness of the matter.

CONCLUSION

For these reasons, the Writ of Certiorari should properly be denied and affirm the obvious holding of the Court of Appeals in and for the Fifth Circuit which affirmed the studious and knowledgable opinion of the Federal District Court.

Respectfully submitted,



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CERTIFICATE OF SERVICE

I, WILLIAM F. CASLER, Counsel for Respondent, and a member

of the Bar of the United States, hereby certify that on the 21st day of May, 1976, I served two copies of the Brief for Respondent in Opposition on Charles Corces, Jr., Assistant Attorney General, 419 Stovall's Professional Building, 305 North Morgan Street, Tampa, Florida 33602, Counsel for Petitioner, by a duly addressed envelope with postage prepaid.

William F. Casler

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